Supreme Court, U.S.
FILED
OCT 9 1997
CLERK

No. 96-1769

IN THE
Supreme Court of the United States
October Term, 1997

OHIO ADULT PAROLE AUTHORITY, *et al.*,
Petitioners,

v.

EUGENE WOODARD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Barbara E. Bergman
Co-Chair, NACDL *Amicus* Committee
1117 Stanford N.E.
Albuquerque, NM 87131
(505) 277-3304

Andrea D. Lyon
Counsel of Record
University of Michigan Law School
Michigan Clinical Law Program
363 Legal Research Bldg.
801 Monroe Street
Ann Arbor, MI 48109-1215
(313) 763-4319

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, under U.S. Const. Amend. XIV, a person sentenced to death has an interest in "life" that triggers the protections of due process at the clemency stage of a capital proceeding?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A CAPITAL DEFENDANT HAS AN INTEREST IN "LIFE" THROUGHOUT THE CAPITAL PROCESS. 3

II. THE "LIBERTY" CASES ON WHICH PETITIONERS RELY DO NOT CONTROL THIS "LIFE" CASE 6

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Page**

Beck v. Alabama,
447 U.S. 625 (1980) 7

Biddle v. Perovich,
274 U.S. 480 (1927) 5

California v. Ramos,
463 U.S. 992 (1983) 7

Connecticut Board of Pardons v. Dumschat,
452 U.S. 458 (1981) 2, 6, 10

Evitts v. Lucey,
469 U.S. 387 (1985) 2, 4, 5, 11

Ford v. Wainwright,
477 U.S. 399 (1986) 4, 7

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 9

Gardner v. Florida,
430 U.S. 349 (1977) 7

Greenholtz v. Inmates,
442 U.S. 1 (1979) 8, 9, 10

Gregg v. Georgia,
428 U.S. 153 (1976) 7, 11

Herrera v. Collins,
506 U.S. 390 (1993) 5, 11

Hewitt v. Helms,
459 U.S. 460 (1983) 9

Lockett v. Ohio,
438 U.S. 586 (1978) 7

Louisiana ex rel. Francis v. Resweber,
329 U.S. 459 (1947) 4

McGee v. Arizona State Board of Pardons and Paroles,
92 Ariz. 317, 376 P.2d 779 (1962) 5

Meachum v. Fano,
427 U.S. 215 (1976) 8, 10

Morrissey v. Brewer,
408 U.S. 471 (1972) 9

Murray v. Giarrantano,
492 U.S. 1 (1989) 4

Sandin v. Conner,
515 U.S. 472 (1995) 9

Screws v. United States,
325 U.S. 91 (1945) 3

Vitek v. Jones,
445 U.S. 480 (1980) 9

Washington v. Harper,
494 U.S. 210 (1990) 9

Wolff v. McDonnell,
418 U.S. 539 (1974) 8

Woodard v. Ohio Adult Parole Authority,
107 F.3d 1178 (6th Cir. 1997) 5

Woodson v. North Carolina,
428 U.S. 280 (1976) 7

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 6

U.S. Const. Amend. XIV . . . . . *passim*

OTHER AUTHORITIES

Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*,
75 B.U. L. Rev. 1507 (1995) 5

Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*,
27 U. Rich. L. Rev. 289 (1993) 6

No. 96-1769

IN THE
Supreme Court of the United States
October Term, 1997

OHIO ADULT PAROLE AUTHORITY, *et al.*,
Petitioners,

v.

EUGENE WOODARD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This *amicus curiae* brief is submitted in support of the position of the Respondent Eugene Woodard. Written consents of the parties to the filing of this brief have been contemporaneously submitted to the Clerk of the Court.[1/]

[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of more than 9,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts. Members of the NACDL regularly represent defendants charged with capital offenses.

The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

SUMMARY OF ARGUMENT

1. The Fourteenth Amendment prohibits States from depriving persons of "life, liberty, or property without due process of law." Under the Due Process Clause, a capital defendant enjoys a protected interest in "life" until the moment of his death. Capital proceedings determine whether the State will deprive the defendant of that protected "life" interest. Thus, every part of capital proceedings must comply with the requirements of due process. When the State chooses to make the possibility of clemency available in the course of capital proceedings, it must do so in accordance with due process. *See Evitts v. Lucey*, 469 U.S. 387 (1985).

2. The difference in kind between "life" and "liberty" distinguishes this case from the prisoner cases--such as *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981)--on which petitioners rely. Those cases rest on the

premise that a convicted and incarcerated prisoner has forfeited all but a residuum of his "liberty." "Life" is different than "liberty." A capital defendant never surrenders his interest in "life" until his death. He retains that interest throughout the capital process, including the clemency stage.

ARGUMENT

I. A CAPITAL DEFENDANT HAS AN INTEREST IN "LIFE" THROUGHOUT THE CAPITAL PROCESS.

The Fourteenth Amendment guarantees that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, cl. 1. A person's interest in "life" arises directly under the Due Process Clause itself; it is not a creature of state law. *See Screws v. United States*, 325 U.S. 91, 131 (1945) (Rutledge, J., concurring) (right to life "comprehends all others").

A capital defendant--like any other person--has a constitutionally protected interest in "life" until the moment of his death. That interest lasts throughout the capital process. It exists at trial, on appeal, and during habeas corpus proceedings. It exists even as the person enters the death chamber and is strapped to the gurney or the chair. It ends only with death.

This proposition appears to be so thoroughly accepted that the Court has repeatedly addressed capital defendants' post-conviction due process claims without questioning whether they had a protected "life" interest in the first place.

See, e.g., Murray v. Giarrantano, 492 U.S. 1 (1989); *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion).[2/] The Court even applied the Due Process Clause--without questioning the existence of a protected interest--to determine whether a second attempt at execution (after the first had failed) comported with the Constitution. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

Because a capital defendant has a constitutionally protected interest in "life" until the moment of his death, all facets of the process by which the State deprives him of that interest must comply with the requirements of due process. Although the States have some flexibility in determining what specific procedures they will provide before depriving a person of life, any such procedures must satisfy the Due Process Clause of the Fourteenth Amendment. "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (direct appeal, although not constitutionally required, must comply with due process).

[2/] Petitioners insist that recognition of a protected interest in "life" at the clemency stage of capital proceedings will require wholesale revision of post-conviction death penalty practice, including a possible overruling of *Giarrantano*. Brief for Petitioners at 21-22. But petitioners' "floodgates" arguments confuse the threshold question of whether a capital defendant retains a protected interest at the clemency stage with the question of the process due. The nature of the process due to the defendant depends in part on the stage of the proceedings. Those protections reach their apex at trial and may diminish thereafter. Recognition that some process is due at the clemency stage will not require the Court to overrule or call into question *Giarrantano* or any other case concerning the protections due capital defendants.

Clemency proceedings form an integral part of the process by which States--including Ohio--administer the death penalty. "Today, all 36 States that authorize capital punishment have constitutional or statutory provisions for clemency," and "[e]xecutive clemency . . . provide[s] the 'fail safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390, 414-15 (1993). As the Court noted in *Herrera*, clemency proceedings provide the principal means by which claims of "actual innocence" can be reviewed after conviction and direct appeal and before execution. *See id.* at 415-17.

Because the States have chosen to make clemency an integral part of the process by which they seek to deprive capital defendants of "life," clemency proceedings must "accord with the Due Process Clause." *Evitts*, 469 U.S. at 401; *see McGee v. Arizona State Board of Pardons and Paroles*, 92 Ariz. 317, 319-20, 376 P.2d 779, 781 (1962); Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U.L. Rev. 1507, 1531-39 (1995).

This case does not require the Court to determine what process is due a capital defendant at the clemency stage; the court of appeals left that issue to the district court in the first instance. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1188, 1193-94 (6th Cir. 1997). It is important to note, however, that procedures designed to produce accurate factfinding can play a critical role in the clemency determination. The modern exercise of clemency is not the inherently mysterious "act of grace" that petitioners describe (Brief for Petitioners at 2-4, 22-24). *Cf. Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (Presidential pardon "in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme."). Recent empirical studies demonstrate that the decision to grant

clemency can turn on essentially factual determinations, such as the possibility that the defendant is actually innocent, the defendant's mental condition, and the relative culpability and punishment of the defendant and those with whom he participated in the crime. *See* Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Rich. L. Rev. 289, 299-303 (1993). Procedural protections will enhance the accuracy of these determinations and thus ensure the effectiveness of the "fail safe" stage of the capital process.

II. THE "LIBERTY" CASES ON WHICH PETITIONERS RELY DO NOT CONTROL THIS "LIFE" CASE.

Petitioners' brief refers repeatedly to "life or liberty," as if those two interests were interchangeable for purposes of the Fourteenth Amendment Due Process Clause. *E.g.*, Brief for Petitioners at 9, 13, 16, 18, 20. Having obscured the critical distinction between "life" and "liberty," petitioners then rely on a series of "liberty" cases--particularly *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981)--to argue that respondent has no protected interest. But this case concerns "life," not "liberty." In light of the critical differences between these interests, *Dumschat* does not control here.

The Framers of the Fourteenth Amendment Due Process Clause--like their predecessors who drafted the same clause in the Fifth Amendment--established a hierarchy of protected interests. "Life" comes first, followed by "liberty" and "property." "Life" stands ahead of "liberty" for intuitively obvious reasons. Life is absolute; once taken, it is gone forever, and it cannot be taken or retained in part. Liberty is a matter of degree; liberty deprived can be restored, and liberty can be taken or retained by increments. A person's

interest in "life" exists undiminished until death. A person's interest in "liberty" can wax and wane over time.

This Court has repeatedly recognized the difference in kind between "life" and "liberty." In case after case, the Court and its members have distinguished between the death penalty--the deprivation of "life"--and sentences of imprisonment--the deprivation of "liberty." *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."); *id.* at 323 (Rehnquist, J., dissenting)(death is different because "it is irreversible; an executed defendant cannot be brought back to life," and because "it is indeed an ultimate penalty, which ends a human life rather than simply requiring that a living human being be confined for a given period of time in a penal institution").[3/] Although decided principally under the Eighth Amendment, the Court's death penalty decisions highlight the distinction

---

[3/] *See also, e.g., California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (plurality opinion) (referring to the "heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life"); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (constitutional difference between death and lesser punishments); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Burger, C.J.) (death profoundly different from all other penalties); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion) ("[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country."); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (Court recognized in *Furman* that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice").

that the Fourteenth Amendment draws between the interest in "life" and the interest in "liberty."

The "liberty" cases on which petitioners rely underscore this distinction. Those cases--all of which involve the rights of incarcerated prisoners sentenced to a term of imprisonment--rest on the premise that a person's "liberty" can vary; it can be taken in whole or in part and similarly restored. In *Wolff v. McDonnell*, 418 U.S. 539 (1974)--the first case in this line--the Court held that incarcerated prisoners retain an interest in liberty that the Fourteenth Amendment Due Process Clause protects. *See id.* at 556-57. The Court recognized, however, that prisoners' interest in liberty may be "subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." *Id.* at 556.

The Court turned again to the nature of a prisoner's "liberty" interest in *Meachum v. Fano*, 427 U.S. 215 (1976), involving an intrastate transfer from one prison to another. The Court found that the transfer did not implicate the prisoner's residual interest in "liberty." It declared that, "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons." *Id.* at 224 (emphasis in original).

The Court further delineated a prisoner's "liberty" interest in *Greenholtz v. Inmates*, 442 U.S. 1 (1979), involving a challenge to Nebraska's method of determining suitability for parole. Distinguishing cases holding that parolees and probationers have a "liberty" interest in their conditional

freedom,[4/] the Court found a "crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty one desires." *Id.* at 9. Because the inmates were "confined and thus subject to all of the necessary restraints that inhere in a prison," the Court found that the Due Process Clause itself did not confer a "liberty" interest in the possibility of parole. *Id.* at 10-11. The Court concluded, however, that mandatory language in the Nebraska parole statutes created an "expectancy of release . . . entitled to some measure of constitutional protection." *Id.* at 12; *see also Hewitt v. Helms*, 459 U.S. 460, 468-72 (1983) (finding that mandatory directives in state administrative segregation regulations created protected "liberty" interest).

In *Vitek v. Jones*, 445 U.S. 480 (1980), involving a transfer from prison to a mental hospital, the Court again recognized that incarcerated prisoners retain a residuum of "liberty" under the Fourteenth Amendment Due Process Clause. Because transfer to a mental hospital was "not within the range of conditions of confinement to which a prison sentence subjects an individual," the transfer implicated that part of the prisoner's interest in "liberty" which had survived his conviction and incarceration. *See id.* at 493-94; *see also Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (involuntary administration of psychotropic drugs implicates prisoner's residual "liberty" interest).[5/]

[4/] *See Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

[5/] The Court's recent decision in *Sandin v. Conner*, 515 U.S. 472 (1995), reaffirms *Vitek*'s analysis of a prisoner's residual liberty interest under the Due Process Clause. *Sandin* appears to have abandoned the holding in *Greenholtz* and *Helms* that mandatory language in state regulations could give rise to a liberty interest beyond that provided by the Due Process Clause itself. *See id.* at 477-84.

Dumschat, on which petitioners principally rely, falls squarely within this line of "liberty" cases. The prisoner in that case repeatedly sought a commutation of his life sentence. The Connecticut Board of Pardons denied his applications without explanation. He sued, claiming (1) that the Board's action implicated a protected "liberty" interest, and (2) that due process required the Board to explain its denial of his applications. Relying on *Meachum* and *Greenholtz*, this Court found that the prisoner had no "liberty" interest at stake, because his conviction had "'constitutionally deprived [him] of his liberty.'" *Dumschat*, 452 U.S. at 464 (quoting *Greenholtz*, 442 U.S. at 7).

The analysis in *Dumschat* and the other prisoner "liberty" cases does not apply to deprivations of a person's interest in "life." The "liberty" cases turn on the fact that, through their convictions and the execution of their sentences of incarceration, the prisoners had *already lost* all but a residual interest in "liberty" for the duration of their sentences. The question in each case was whether the state procedure at issue implicated that residual interest.

"Life" is different. Conviction and incarceration may largely extinguish a prisoner's "liberty," but they cannot extinguish his "life" as long as he lives. A prisoner awaiting execution on death row may have lost all but a residual interest in "liberty," but he has not lost any part of his interest in "life." Thus, as he sits in prison today, Eugene Woodard has only the barest surviving interest in "liberty"; *Dumschat* makes that clear. But Woodard has the same, indivisible interest in "life" that he has always had, and he will retain that interest until the day he dies. Nothing in *Dumschat* or any of the other prisoner "liberty" cases on which petitioners rely is to the contrary. To the extent anything in the "liberty" cases has relevance here, it is the Court's distinction in *Greenholtz*

between "being deprived of a liberty one has . . . and being denied a conditional liberty one desires." 442 U.S. at 9. Ohio seeks to deprive Woodard of the life he "has," not some "conditional [life he] desires."

* * * *

In *Herrera*, this Court underscored the critical significance of the clemency stage in the capital process. The Court acknowledged that "our judicial system, like the human beings who administer it, is fallible"; it characterized clemency as the "fail safe" in that "fallible" system; and it noted that "the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." 506 U.S. at 415, 417; *see also Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion) (capital process without clemency would be "totally alien to our notions of criminal justice"). In light of the essential role clemency plays in the process by which capital defendants may be deprived of "life," States must conduct the clemency stage "in accord with the Due Process Clause." *Evitts*, 469 U.S. at 401.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ANDREA D. LYON
Counsel of Record
University of Michigan Law School
Michigan Clinical Law Program
363 Legal Research Bldg.
801 Monroe Street
Ann Arbor, MI 48109-1215
(313) 763-4319

BARBARA BERGMAN
Co-Chair, NACDL *Amicus* Committee
1117 Stanford N.E.
Albuquerque, NM 87131
(505) 277-3304

October 9, 1997